Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-1022

No. _____

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

JAMES Y. HOPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

C. ROBERT SATTI, SR.
State's Attorney
New London Judicial District
70 Huntington Street
New London, CT 06320
(203) 443-2835

Counsel of Record
for Petitioner

QUESTION PRESENTED

When The State Has Jointly Prosecuted Charges Of Conspiracy And The Substantive Offense, But The Defendant Has Caused A Mid-Trial Mistrial Of The Substantive Count, Does The Double Jeopardy Clause Prohibit A Reprosecution Of The Substantive Count After A General Verdict Of Acquittal Of The Conspiracy Count?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THIS COURT AND WITH DECISIONS OF CIRCUIT COURTS OF APPEALS 9

A. The Decision Below Conflicts With Decisions Of This Court Which Hold That Where Defendant Has Caused The Separation Of Two Counts For Trial, Double Jeopardy Does Not Apply 9

B. The Decision Below Conflicts With Decisions Of Courts Of Appeals Which Hold That, Where Charges Of Conspiracy And The Substantive Crime (As An Accessory) Are Jointly Tried, An Acquittal As To The Conspiracy Count Does Not Bar Reprosecution Of The Mistried Substantive Count 13

II. THE CONNECTICUT SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Arizona v. Washington, 434 U.S. 495, 98 S.Ct. 824 (1978) 11

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970) 17, 18

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) 10

Flittie v. Solem, 775 F.2d 933 (8th Cir. 1985) 15

Grady v. Corbin, 495 U.S. ____ (1990) 10, 18

Green v. United States, 355 U.S. 184, 78 S.Ct. 221 (1957) 10

Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066 (1973) 11

Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207 (1977) 9

Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141 (1977) . . . 12

Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984) 9, 10

Oregon v. Kennedy, 459 U.S. 812, 103 S.Ct. 2088 (1982) 9

Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984) 11

Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170 (1978) 10

Standefer v. United States, 447 U.S. 10, 100 S.Ct. 1999 (1980) 10

State v. Hope, 215 Conn. 570, 577 A.2d 1000 (1990) . . . . . *passim*

TABLE OF AUTHORITIES – Continued

CASES — PAGE(S)

United States v. Benton, 852 F.2d 1456 (6th Cir. 1988) . . . 17

United States v. Clark, 613 F.2d 391 (2d Cir. 1979) 15

United States v. Jackson, 778 F.2d 933 (2d Cir. 1985) 14, 15, 18

United States v. Mespoulde, 597 F.2d 329 (2d Cir. 1979) 17

United States v. Nelson, 599 F.2d 714 (5th Cir. 1979) 15

United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187 (1978) 9, 11

United States v. Seijo, 537 F.2d 694 (2d Cir. 1976) . . . 15, 17

United States v. Webbe, 755 F.2d 1387 (9th Cir. 1985) . . . 14

UNITED STATES CONSTITUTIONAL PROVISIONS

Fifth Amendment 2

Fourteenth Amendment 2

CONNECTICUT GENERAL STATUTES

§ 53a-48 (Rev. to 1981) (Conspiracy) 2

§ 53a-54a (Rev. to 1981) (Murder) 3

§ 53a-54b (Rev. to 1981) (Capital Felony) 3

FEDERAL STATUTES

28 U.S.C. § 1257 2

No. _____

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

JAMES Y. HOPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on July 10, 1990.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 215 Conn. 570, 577 A.2d 1000 (1990) and is reprinted in the appendix, p. 1A, *infra.*

JURISDICTION

The decision of the Connecticut Supreme Court was entered on July 10, 1990. The order denying a timely motion for reargument and/or reconsideration was entered on September 18, 1990, and is reprinted in the Appendix, p. 24A, *infra*. The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V provides, in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

Constitution of the United States, Amendment XIV, Sec. 1, provides, in pertinent part:

> . . . [N]or shall any state deprive any person of life, liberty or property, without due process of law.

Connecticut General Statutes § 53a-48 (Rev. to 1981) provided, in pertinent part:

> **Conspiracy** . . . (d) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in . . . such conduct, and anyone of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes § 53a-54a (Rev. to 1981) provided, in pertinent part:

> **Murder defined** . . . (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . .

Connecticut General Statutes § 53a-54b (Rev. to 1981) provided, in pertinent part:

> **Capital felony.** A person is guilty of a capital felony who is convicted of any of the following . . . (2) murder committed by a defendant who is hired to commit the same for pecuniary gain . . .

STATEMENT OF THE CASE

A. FACTS

In July 1981, Geraldine Burke wanted to have her allegedly abusive husband, Donald Burke, killed. She spoke to a friend, John McGann, who in turn spoke to one Rooney about getting someone to do the killing. She thereafter borrowed $3,500 from a neighbor, gave it to McGann, who in turn gave $3,000 of it to Rooney, who said the job would be done in about two weeks. On July 20th, Geraldine entered a hospital for an operation. It was planned that Donald would be murdered during her hospitalization. Near the end of her stay, McGann told her it looked like Rooney might not have Donald killed, and he would do the job himself. App. 2A-3A.

On August 6th, Geraldine went to a friend's house for a picnic. McGann and the respondent were there.

Geraldine claimed that, while at the picnic, the respondent told her he would kill Donald because McGann would "screw it up." She further claimed that she, McGann, and the respondent went to respondent's house and called Rooney to get the money back, and after the call McGann said he would do the job himself. App. 3A.

On August 8th at 2:30 p.m., Geraldine and McGann met and discussed plans to kill Donald that night. At about 6:30 p.m., McGann and respondent went to a cafe. Later, while there, McGann talked to Geraldine on the phone, and it was arranged that Geraldine would bring Donald's pistol to a parking lot near the cafe. McGann told the respondent he was going to kill Donald and asked if respondent would help move the body. Later, McGann and respondent met Geraldine and Carrol Pate in the parking lot. McGann got the pistol and was driven by respondent to Burke's house where Geraldine, who had returned to the house with Carrol, let them in. App. 3A–4A.

According to Geraldine, the respondent told her to go into the bedroom to see if Donald was asleep, and thereafter told her to go into the living room. While there, she heard blows being struck in the bedroom. McGann then went into the bedroom, a shot was fired, and McGann left the bedroom to unjam the gun. McGann returned to the bedroom, and Geraldine heard more shots and blows and then heard McGann say, "Stop hitting him, he's dead." Thereafter, McGann and the respondent dragged Donald's body outside and put it in Donald's truck, later driving it away. Other incriminating evidence was removed from the house. App. 5A.

The respondent testified that he never told Geraldine or anyone else that he would kill Donald. He claimed he went to the house in the hope of persuading McGann and Geraldine not to kill Donald and that he had no intent to commit murder. He denied the beating or being in the room when Donald was killed. He admitted moving the body and secreting evidence after the murder, but claimed he did so out of fear. App. 5A-6A.

The following additional evidence was presented at the trial, but not included in the opinion: The respondent testified and presented supporting witnesses that he never spoke with Geraldine about the killing on August 6th and never went to his house to call Rooney. Geraldine testified that she never agreed with respondent that he would kill Donald; that she first made up her mind to be directly involved in the killing on August 8th; that she never talked to respondent about it, and had no prior contact with him that date until she saw him in the parking lot that night. App. 28A-29A.

B. PROCEEDINGS

The respondent was indicted by a grand jury on charges of: 1) Conspiracy to Commit Capital Felony, and 2) Capital Felony Murder.[1] See pp. 2-3. On October 19, 1981, he moved to dismiss the second (substantive) count, claiming, *inter alia,* that it was defective because he could not be convicted of such charge as an accessory. This motion was denied. On December 21, 1981, he filed his

---

[1] Geraldine Burke and McGann were indicted on the same charges, but their cases were separately prosecuted.

second motion to dismiss this count, claiming in effect that only the hired person could be convicted under the statute and it was not alleged that he was the hired person. This motion was denied. App. 7A-8A.

Jury selection commenced on May 3, 1983. Because, during that process, respondent generally suggested both counts were defective, the State, on June 1, 1983, filed a motion which sought a ruling from the court as to the validity of the second count, when the defendant was not the hired person but acted as accessory or co-principal to the murder. The State conceded that it had no evidence this defendant was hired to kill Donald or that he hired anyone to do so. App. 9A.

The Court initially did not act on the motion because respondent objected to its being considered since he'd made no current motion to dismiss and he did not intend to do so until the jury was sworn. Although the State urged the Court to consider the motion, respondent continually objected, claiming the Court had no power to act, *suo moto,* and objected to any dismissal. After a recess, the Court stated it had the right to dismiss a defective indictment. Defense counsel again argued the hired person must be the defendant and again objected to the Court ruling. He then asked what would happen if the second count were dismissed and the State responded that the election to postpone trial or proceed would be up to respondent. Counsel said he wanted to proceed and again objected to dismissal. The Court reserved decision, and then before the jury was sworn, decided that it would take no action to dismiss the substantive count. App. 23A, 25A-27A.

Immediately after the jury was sworn on June 29, 1983, respondent moved to dismiss the second count as being defective because it failed to allege that the hired person, McGann, committed the murder. During extensive argument, respondent claimed the trial could not continue on the lesser offense of murder. Again the state offered respondent the option of proceeding on the first count or delaying trial until both counts could be tried together, pointing out it intended to appeal an adverse decision and retry the second count. The issue was continued until a later date and the trial continued. App. 27A.

On July 8th, during further argument, the State's Attorney advised the court he had an amendment to the indictment and/or a bill of particulars to clear any defect. He suggested ways the trial could proceed on both counts, but the court sustained respondent's objections to such proceedings. App. 27A.

On July 19th, upon being pressed by respondent, the court dismissed the second count because it did not allege that McGann committed the murder, ruled that such defect could not be cured by amendment or bill of particulars, and rejected the State's offer to proceed on the lesser offense of murder, ruling that the indictment could not be redacted. The State than attempted to file an information[2] which cleared any defect, charging capital felony murder and suggested how the two charges could continue to be tried together. Respondent objected and the court would not permit the filing. App. 26A-27A.

---

[2] At the time of the motion, Connecticut law had been changed to require prosecution by information.

The State continually notified the court and respondent of its intent to retry the second count. The case continued as to the first (conspiracy) count only, and on August 9, 1983, the jury rendered a verdict of not guilty as to that count. App. 27A-28A.

The State, having been granted permission, appealed the dismissal of the second count, alleging, *inter alia*, that the court erred 1) in granting the motion because of an alleged pleading defect; 2) in granting the motion as to the lesser offense of murder by refusing to permit redaction; and 3) by refusing to permit the State to file a sufficient information, thus permitting the trial to continue on both counts. Before the State's appeal was heard, the Connecticut Supreme Court decided *State v. McGann*, 199 Conn. 163, 506 A.2d 109 (1986), holding this was not a true capital felony murder under the statute. As a result of the *McGann* decision, the State's appeal was dismissed as moot in May 1987 because respondent could not be tried on capital felony. *State v. Hope*, 203 Conn. 420, 524 A.2d 1148 (1987). App. 10A.

On June 1, 1987, the State filed an information charging the defendant with murder. On November 24, 1987, respondent moved to dismiss on double jeopardy and collateral estoppel grounds and sought numerous continuances to procure transcripts and file briefs. On May 29, 1989, the trial court denied the motion and respondent appealed. The Connecticut Supreme Court reversed, holding that the first jury necessarily found that defendant did not have the intent to kill, and remanded the case with direction to grant the motion to dismiss. App. 10A-11A, 20A.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THIS COURT AND WITH DECISIONS OF CIRCUIT COURTS OF APPEALS

A. The Decision Below Conflicts With Decisions Of This Court Which Hold Tnat Where Defendant Has Caused The Separation Of Two Counts For Trial, Double Jeopardy Does Not Apply

This case presents a substantial issue regarding the applicability of Double Jeopardy/Collateral Estoppel protections where the state has joined two distinct offenses arising out of the same transaction, but the defendant has caused the second count to be mistried, mid-trial, thus causing the second prosecution. This Court has held that, in the context of separate trials, principles of double jeopardy are inapplicable if the defendant elects to have the two offenses tried separately, see *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207 (1977). This is so even if there is a mid-trial dismissal of one count and the defendant seeks to have the trial terminated on grounds unrelated to the issue of his guilt or innocence as to that count. *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187 (1978). There is no bar to a retrial of the mistried count even if defendant's motion is necessitated by prosecutorial error, unless the prosecutor's action is intended to "goad" the defendant into moving for a mistrial. *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083 (1982). A defendant should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on pending charges, *Ohio v. Johnson,* 467 U.S. 493, 104 S.Ct. 2536 (1984). In a criminal case, the government is

often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel; thus, where rules prevent the government from fully presenting its case in the first trial, application of non-mutual estoppel would be plainly unwarranted. *Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 2007-08 (1980).

Even in those cases where this Court has found double jeopardy to bar a second prosecution, it has specifically noted that the decision was not concerned with separate prosecutions caused by the defendant. See *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 2225, n.5 (1977); *Sanabria v. United States,* 437 U.S. 54, 98 S.Ct. 2170, 2185 (1978). In the very recent case of *Grady v. Corbin,* 495 U.S. ____ (1990), the Court, in holding that double jeopardy barred a second prosecution where the State had separately proceeded on two charges, pointed out that, if the State had joined the two charges in a single proceeding, it would have avoided the double jeopardy question. The State in the present case complied with this basic procedure. Nevertheless, the Connecticut Supreme Court found a constitutional violation.

In the context of separate trials, the purpose of the Double Jeopardy Clause is to prohibit the State, with all its resources and power, from making repeated attempts to convict the defendant. It is designed to prohibit government oppression. *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 223 (1957). But, where the State has made no effort to prosecute the charges *seriatim,* the considerations of double jeopardy implicit in the application of collateral estoppel are inapplicable. *Ohio v. Johnson, supra,* n.9. The defendant's "valued right to have his trial completed by a

particular tribunal" must give way "to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws"; see *Arizona v. Washington,* 434 U.S. 495, 98 S.Ct. 824, 832 (1978); *Richardson v. United States,* 468 U.S. 317, 104 S.Ct. 3081, 3085 (1984); and "the public's interest in fair trials to end in just judgments", *Illinois v. Somerville,* 410 U.S. 458, 98 S.Ct. 1066 (1973). This is especially true where a mistrial is declared at defendant's request because such motion "is deemed to be a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact. The important consideration is that defendant retain primary control over the course to be followed." *United States v. Scott, supra,* 98 S.Ct. at 2195. Double jeopardy, which guards against government oppression, does not relieve a defendant of the consequences of his voluntary choice. *Id.* at 2198. Here that choice was to sever the counts for trial.

The Connecticut Supreme Court in effect held that where the prosecution has joined two charges for trial but the defendant has elected to have them separated by a mid-trial mistrial of one of the counts, the collateral estoppel doctrine bars reprosecution of the mistried count.

The Connecticut Supreme Court did not even consider the State's claim that decisions of this Court hold that, in the context of successive prosecutions, principles of double jeopardy/collateral estoppel are inapplicable if the first trial is terminated on factors unrelated to guilt or innocence as to a count, especially if the second prosecution has been caused by the defendant and there has been no prosecutorial or judicial overreaching. This claim

was specifically raised by the State – Appellee in its Brief, see App. 30A-31A.

In addition, the Court below did not even touch upon all of the efforts of the State to insure that both counts would be tried in the same proceeding, nor the successful efforts of the respondent preventing such from occurring. This claim was specifically raised by the State in its Brief, see App. 26A-28A, and in its Motion to Reargue, App. 23A. In deciding respondent had not waived his rights, the Court quoted from Justice Brennan's concurring opinion in *Lee v. United States,* 432 U.S. 23, 97 S.Ct. 2141 (1977). It completely disregarded Justice Marshall's dissenting opinion in *Lee,* p. 2149, in which he noted that ". . . the United States Attorney never made any effort to defend the information and did not offer to amend and correct the error." Here the State's Attorney argued at length in opposition to defendant's motion to dismiss, and attempted in many ways to correct the alleged error. More importantly, the *Lee* decision did not involve an issue of collateral estoppel, and the majority opinion of this Court held that there was no double jeopardy bar to reprosecution of the mistried count.

Finally, the Connecticut Supreme Court, in concluding that respondent had not waived his right to collateral estoppel protections, completely disregarded the fact that respondent, from the commencement of jury selection until the jury was sworn, continually objected to the trial court even considering a possible pleading defect in the second count. This claim was specifically raised by the State in its Brief, App. 25A-27A, and in its Motion to Reargue, App. 23A. In effect, it allowed the respondent to

manipulate the criminal justice system by severing the charges and then relying upon the provisions of the Double Jeopardy Clause to bar a prosecution of the severed charge. This result was never anticipated by any of this Court's rulings.

In light of the manifest conflict between the decision of the Connecticut Supreme Court and this Court's precedents, the petition should be granted.

B. The Decision Below Conflicts With Decisions Of Courts Of Appeals Which Hold That, Where Charges Of Conspiracy And The Substantive Crime (As An Accessory) Are Jointly Tried, An Acquittal As To The Conspiracy Count Does Not Bar Reprosecution Of The Mistried Substantive Count

This case now involves issues relating to charges of conspiracy (to murder) and the substantive crime (murder) as an accessory. The first jury acquitted respondent of the conspiracy count after the substantive count had been mistried, mid-trial, on respondent's motion. The Connecticut Supreme Court's decision conflicts with decisions of Circuit Courts of Appeals dealing with similar issues.

Numerous decisions of Federal Courts of Appeals have held that charges of conspiracy to commit an offense and the underlying substantive offense are not the same offense, even if the defendant is charged as an accessory or an "aider and abetter" in the substantive offense. These decisions generally hold that if the defendant is acquitted of the conspiracy, but the jury cannot agree as to the substantive charge (and it is thus mistried), there is no collateral estoppel bar to a reprosecution of the substantive

offense. This is so because acquittal on a conspiracy charge need not mean that all the elements required to prove a conspiracy were found to be lacking. If several elements were litigated, acquittal can mean that the jury found in favor of the defendant on only one element. A general verdict, however, does not reveal the identity of that element. *United States v. Webbe,* 755 F.2d 1387, 1388 (9th Cir. 1985).

The *Webbe* rule applies, even though the substantive charge involves a specific intent crime, and the defendant is charged as an accessory in the substantive count. In *United States v. Jackson,* 778 F.2d 933 (2d Cir. 1985), the defendant played a peripheral part in the conspiracy (to import heroin with intent to distribute) charge. He was acquitted of that count, but the jury could not agree on the substantive charge of possession of heroin with intent to distribute, and that charge was mistried. In the second prosecution on the substantive charge, he was found guilty, and the appellate court held there was no collateral estoppel bar to retrial even though he was charged as an accessory. The Court pointed out that the offenses of conspiracy and of aiding and abetting, while closely allied, are distinct. *Id.* at 940. After addressing both sides of the coin, i.e., acquittal of substantive offense and retrial on conspiracy/acquittal of conspiracy, retrial on substantive offense, the Court said at page 940:

> "there can be no general principle that, after acquittal on a conspiracy count, the government may not retry a defendant on a related substantive count . . . when the first trial results in an acquittal on the conspiracy charge, generally there is no way of telling whether the basis for acquittal

> was disbelief of some portion of the Government's evidence, and what that portion might have been, or whether the jury simply regarded the evidence as insufficient to prove an agreement, especially when . . . the Government's evidence did not place the retried defendant at the center of the conspiracy." *Id.*

See *United States v. Clark,* 613 F.2d 391 (2d Cir. 1979), *cert. denied,* 449 U.S. 820 (1980). See *Flittie v. Solem,* 775 F.2d 933, 937 (8th Cir. 1985), *cert. denied,* 475 U.S. 1025 (1986). (Conspiracy to commit murder is not the same offense as accessory to murder. Conspiracy requires proof of an agreement; a defendant may render assistance to a felon without necessarily having reached an agreement to commit a felony); *United States v. Nelson,* 599 F.2d 714, 716 (5th Cir. 1979). (Aiding and abetting the commission of a crime is not the same as conspiracy since the latter requires proof of an agreement to commit an offense and the former does not, thus collateral estoppel does not bar a reprosecution for aiding and abetting the substantive crime subsequent to acquittal of conspiracy). The burden is on the defendant to establish that the issue he seeks to foreclose was necessarily resolved in his favor by the first verdict. *United States v. Siejo, supra,* at 697; *United States v. Clark, supra,* at 400.

Here, as in *Jackson, supra,* the State's evidence did not place the defendant at the center of the conspiracy. At best, it showed that he entered the ongoing conspiracy between Geraldine Burke and McGann close to its culmination. After the mid-trial dismissal of the substantive count, the remaining evidence, the arguments of counsel and the trial court's instructions related to the conspiracy

count. Respondent strongly contested the existence of an agreement. The jury was never instructed on the elements of being an accessory to murder. The judgment of the Connecticut Supreme Court in effect holds that where a defendant is charged with both a conspiracy, and the underlying substantive count as an accessory, acquittal of the former bars reprosecution of the latter in the case of specific intent crimes, contrary to the holdings of the above-cited federal cases.

To arrive at this decision, the Connecticut Court, after acknowledging a defendant's burden of proof, *State v. Hope,* App. 16A, in effect placed the burden on the State to prove what was necessarily decided by the jury in its first general verdict of acquittal. This is evident from that Court's statement ". . . if the jury could have rationally and reasonably concluded that the state did not meet its burden of proving an agreement, but did meet its burden regarding the defendant's intent, then the defendant's collateral estoppel claim must fail." App. 18A. If the jury could have concluded that the State failed to meet its burden of proving an agreement (and here it certainly could have), the inquiry should end, for this alone is sufficient to defeat a collateral estoppel claim, regardless of what intent was proven. It placed this burden on the State even though the substantive crime was taken from the jury, mid-trial, and the jury never had the opportunity to consider whether respondent was guilty as an accessory.

II. THE CONNECTICUT SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

If this Court should determine that the Connecticut judgment is not in direct conflict with this Court's prior decisions, then the Connecticut Court has decided an important question of federal law that has not been, but should be, decided by this Court. Petitioner, after extensive research, is unaware of any decision of this Court or of Courts of Appeals that is specifically dispositive of the instant case.

Double jeopardy prohibitions are considered in many contexts. The collateral estoppel doctrine has been variously referred to as an "ingredient", *United States v. Siejo*, 537 F.2d 694, 696 (2d Cir. 1976), an "element of", *United States v. Mespoulde*, 597 F.2d 329, 332 (2d Cir. 1979), and "part of", *United States v. Benton*, 852 F.2d 1456, 1466 (6th Cir. 1988), the Double Jeopardy Clause. In the leading case of *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970), this Court held that the doctrine, embodied in the Double Jeopardy Clause, means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. Even though *Ashe* involved separate charges and successive prosecutions caused by the government, its holding has been oft cited in cases where two counts are joined for trial by the prosecution, the jury acquits as to one count and cannot agree as to the second count, thus causing it to be mistried.

As noted in petitioner's first claim, general principles of double jeopardy are inapplicable when the defendant

has caused the second prosecution. In the usual collateral estoppel case where the two counts have initially been joined, it is not the defendant who has caused the second prosecution, but the failure of the jury to agree as to the second count. See *United States v. Jackson,* 778 F.2d 933 (2d Cir. 1985) and the cases cited therein.

The decision of the Connecticut Supreme Court extends the collateral estoppel doctrine beyond the bounds of decisions of this Court when dealing with general double jeopardy considerations. It has the effect of deciding that the "part", "ingredient" or "element" is greater than the whole, and permitted the respondent to manipulate the collateral estoppel doctrine to become a sword instead of a shield.

It is especially important that this issue be addressed at this time in light of the recent holding of this Court in *Grady v. Corbin, supra.* Although *Grady* involved a second prosecution caused by the government (as did *Ashe v. Swenson, supra*), the general principle established by that decision (double jeopardy bars a subsequent prosecution with regard to the same underlying conduct for which a defendant has already been prosecuted) could easily be extended to a case such as the subject case, even though the actions of the defendant caused the second prosecution. The Connecticut court cited the *Grady* holding in an open footnote suggesting that it might be applicable to this case. See App. 11A, n.5. Unless the limitations of *Grady* are addressed, *per se* application of its doctrine could lead to unintended results. Although the *Grady* opinion suggested that all the prosecution had to do was to join the two charges to avoid the double jeopardy

question, it did not address the issue of a severance of counts caused by a defendant, either pre-trial or mid-trial, and the collateral estoppel consequences of such action by the defendant. This is the precise issue presented here.

CONCLUSION

The Connecticut Supreme Court has held that the salutary protections of the Double Jeopardy Clause, as applied in the context of collateral estoppel, bars the successive prosecution of a defendant who has himself caused severance of criminal charges and then gained an acquittal on the trial of the first count. In its effect, the judgment below converts double jeopardy protections, which are intended as a shield from government oppression, into a sword wielded by a defendant. Indeed, the State consistently endeavored to try all charges against the defendant in one trial to avoid the possibility of a successive prosecution. Despite the fact that severance was caused by the respondent's own strategic maneuvers, the Connecticut Supreme Court applied the collateral estoppel doctrine, thus depriving the State of its legitimate right to have one full and fair opportunity to prosecute those who have violated its laws.

Because the Connecticut Supreme Court has departed from the principles espoused by this Court and the federal courts of appeal, the writ of certiorari should be granted.

Respectfully submitted,

THE STATE OF CONNECTICUT

C. ROBERT SATTI, SR.
State's Attorney

Counsel of Record

No. _____

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

JAMES Y. HOPE,

Respondent.

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

OPINION OF CONNECTICUT SUPREME COURT 1A

EXTRACTS FROM STATE'S MOTION FOR REARGUMENT OR RECONSIDERATION . . . 21A

DENIAL OF REQUEST FOR REARGUMENT AND/OR RECONSIDERATION 24A

EXTRACTS FROM BRIEF OF STATE OF CONNECTICUT — APPELLEE IN THE CONNECTICUT SUPREME COURT 25A

STATE OF CONNECTICUT *v.* JAMES Y. HOPE (13720)

PETERS, C. J., SHEA, GLASS, COVELLO and HULL, Js.

Charged with the crime of murder by aiding and abetting, the defendant appealed to this court challenging the trial court's denial of his motion to dismiss. The defendant claimed that the trial court should have dismissed that charge because his prosecution was barred by principles of double jeopardy. In connection with the incident in question here, the defendant previously had been charged with the crimes of conspiracy to commit capital felony and of capital felony. On motion by the defendant, the capital felony charge had been dismissed with prejudice, as had the lesser included offense of murder. The defendant had been acquitted, following a jury trial, of the capital felony conspiracy charge and of the lesser included charge of conspiracy to commit murder. *Held* that the trial court should have granted the defendant's motion to dismiss; in acquitting the defendant of the conspiracy charge, in the earlier prosecution, the jury necessarily determined that he lacked the specific intent that the victim be murdered, and since that same intent is an element essential to the prosecution here, the state was collaterally estopped from proceeding with that prosecution.

Principles of collateral estoppel as embodied in the double jeopardy clause, discussed.

Argued May 4—decision released July 10, 1990

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, where the court, *Hendel, J.*, denied the defendant's motion to dismiss and the defendant appealed to this court. *Reversed.*

Hubert J. Santos, for the appellant (defendant).

C. Robert Satti, Sr., state's attorney, for the appellee (state).

GLASS, J. The dispositive issue in this appeal is whether the state is barred by the double jeopardy clause from prosecuting the defendant for aiding and abetting murder after the defendant had been acquitted of conspiracy to commit capital felony murder and

the lesser included offense of conspiracy to commit murder. Because an understanding of the facts of this case is necessary to examine its procedural history, we shall summarize the relevant evidence presented at the defendant's first trial, prior to detailing the procedural history of the case.

Geraldine Burke wanted to have her third husband, Donald Burke, to whom she had been married for two years, killed because of his alleged maltreatment of her. In furtherance of this plan, Geraldine Burke asked her daughter, Tammy Pate, to find someone to commit the murder. In June, 1981, Tammy Pate began to date John McGann, and subsequently introduced McGann to her mother. In July, 1981, Geraldine Burke asked McGann whether he knew anyone whom she could pay to kill her husband. A few days later, McGann told Geraldine Burke that he had found someone to commit the murder and that it would cost $4000. Geraldine Burke then borrowed $3500 from a neighbor, which she gave to McGann with the understanding that McGann would advance the balance of $500 himself to make $4000.

McGann had spoken previously to an individual named George Rooney, an auto mechanic in Groton, in regard to having someone eliminated. After four or five meetings, Rooney told McGann that the job could be done by someone in Rhode Island for $3000. In July, 1981, McGann gave Rooney $1500 in cash saying he would return a few days later with the balance of $1500. At that time, McGann also gave Rooney a photograph of Donald Burke that had Burke's vehicle registration number and the type of vehicle that he drove written on the back. Two or three days later, McGann saw Rooney again and paid him the outstanding $1500. After paying Rooney, McGann had a number of bills left over, which he put back in his pocket. Rooney then told McGann that the job would take two or three weeks to complete.

On July 20, 1981, shortly after Geraldine Burke had given McGann the $3500, she entered the hospital for treatment of an ulcer. It had been planned that Donald Burke would be murdered while she was in the hospital. Towards the end of her stay, however, McGann told her that it looked as though Rooney might not have Donald Burke killed and, if that were the case, he would do the job himself. Upon leaving the hospital on August 6, 1981, Geraldine Burke went with Tammy Pate to a picnic at a friend's house on Niantic River Road in Waterford. McGann and the defendant attended the picnic as well. Throughout June and July, 1981, McGann, a friend of the defendant, had told him of the situation at the Burke house and the plot to kill Donald Burke. While at the picnic, Geraldine Burke claimed that the defendant told her that he would rather kill Donald Burke himself because McGann would "screw it up" and because he (the defendant) could "kill [Donald Burke] with just one blow" as a result of his knowing some type of karate.

Later that day, McGann and Geraldine Burke left the picnic and walked across the street to the defendant's house to use the phone. Tammy Pate and the defendant also walked over to the defendant's house and arrived there just as McGann was getting off of the phone. McGann said that he did not think he could get the money back from Rooney, and added that, if he did not get the money back, he would do the job himself. That night, McGann mentioned to the defendant drugging, strangling or shooting Donald Burke.

On August 8, 1981, at approximately 2:30 p.m., Geraldine Burke and Tammy Pate picked up McGann at his house and drove to Danny's Cafe, a bar in Niantic. McGann said to Geraldine Burke that "[t]onight's the night," and a discussion was held about drugging Donald Burke with valium in order to kill him. Later, they returned to the Burke house where Geraldine

Burke filled a capsule with four crushed tablets of valium with the intention of giving the capsule to Donald Burke. Tammy Pate then gave McGann a ride home. Donald Burke returned home from work around 5 or 5:30 p.m. and Tammy Pate gave him a large glass of wine and he soon fell asleep. At about 6 or 6:30 p.m., the defendant picked up McGann and went to Danny's Cafe. At about 10 p.m., Tammy Pate joined McGann, the defendant and John Pate, Jr., Geraldine Burke's son, at Danny's Cafe.

McGann asked Tammy Pate to phone her mother from Danny's Cafe. Geraldine Burke told Tammy Pate on the phone that Donald Burke had fallen asleep, and Tammy Pate then handed the phone to McGann. As a result of her telephone conversation with McGann, Geraldine Burke took her husband's .22 caliber pistol from his truck, put it in the back seat of her car, and drove to the parking lot of Mitchell's Grocery Store with her ex-sister-in-law, Carrol Pate. While inside Danny's Cafe, McGann told the defendant that he was going to kill Donald Burke and asked if he would help move the body. The defendant, McGann and John Pate, Jr., then went outside Danny's Cafe, where, according to John Pate, Jr., the defendant told him that he and McGann were going to his house to kill his stepfather, Donald Burke. McGann, the defendant and John Pate, Jr., then walked over to the parking lot of Mitchell's Grocery Store to meet Geraldine Burke, where, according to Geraldine Burke, the defendant said to her: "I told your son I'm going to kill . . . your husband tonight. . . . He has the right to know." McGann then got the pistol out of Geraldine Burke's car and was driven by the defendant to the Burke house.

Geraldine Burke left the parking lot with Carrol Pate, stopped at a Burger King, and met the defendant and McGann back at her house. The defendant was waiting at the back door and entered the house with Ger-

aldine Burke and Carrol Pate. According to Geraldine Burke, the following sequence of events then transpired. The defendant asked which room was Donald Burke's, and Geraldine Burke said that it was down the hall. The defendant led Geraldine Burke down the hall and told her to go into the bedroom to see if Donald Burke was asleep. The defendant then told Geraldine Burke to get into the living room, and as she walked away she heard blows being struck in the bedroom. At that time, McGann went into Donald Burke's bedroom and a shot was fired. McGann then left the bedroom to unjam the pistol, and Geraldine Burke once again heard the sound of blows being struck in the bedroom. McGann returned to the bedroom, and Geraldine Burke heard more shots and blows. Finally, Geraldine Burke heard McGann say "[s]top hitting him; he's dead," and the defendant say "[h]e died hard, didn't he?" The defendant then ordered Geraldine Burke to get something to cover Donald Burke's body, and she returned with an afghan and a plastic bag. The defendant and McGann put Donald Burke's body into the plastic bag, covered it with the afghan, and dragged it outside and put it into Donald Burke's truck. The defendant and McGann then proceeded to remove other incriminating evidence from the house.

The defendant, however, testified that he never told Geraldine Burke that he could or would kill Donald Burke, and that he never told John Pate, Jr., that he was going to kill Donald Burke, but rather told him only that Geraldine Burke and McGann were going to kill Donald Burke. In addition, the defendant testified that, although he went to the Burke residence knowing of the plan by McGann and Geraldine Burke to kill Donald Burke, he had no intention of committing murder. Instead, he claimed that he had actually offered Geraldine Burke money to forget her plan to have Donald Burke killed, and that he drove McGann to the Burke

house in the hope of persuading him and the others not to kill Donald Burke. Thus, while the defendant admitted to being present at the Burke house when Donald Burke was killed, he denied beating Donald Burke or even being present in the room when Donald Burke was killed. Rather, he claimed that he was sitting at the kitchen table with Carrol Pate when he heard shots being fired. In sum, the defendant denied "that he assisted McGann in the killing of [Donald] Burke or directly participated in the killing or engaged in concerted action with McGann and [Geraldine] Burke to commit murder." Moreover, the defendant explained his actions of moving Donald Burke's body and of secreting evidence after the murder as ones of fear and panic.

To buttress further its theory that the defendant was a direct participant in the murder, the state called Henry Lee, chief of the Connecticut state police forensic crime laboratory. Lee testified that certain blood splatter patterns found on the back of the defendant's blue jeans indicated that he was in close proximity to the body at the time of the murder. The defense countered Lee's testimony with its own blood splatter expert's testimony that the patterns indicated that the defendant was not near the body at the time of the killing. The state also called Catherine Galvin, then Connecticut's chief medical examiner, who testified that bruises and contusions found on Donald Burke's face were consistent with his being beaten before being murdered. The defense, however, countered this testimony with testimony from its own pathologist, who testified that the injuries to Donald Burke's face were the result of gunshot wounds to the head. In addition, the defendant testified that he was intoxicated on the night of Donald Burke's murder.

The jury was presented with all of this evidence as a result of proceedings that began on October 13, 1981,

when the state filed a two count indictment charging the defendant with the crimes of conspiracy to commit capital felony murder in violation of General Statutes §§ 53a-48 (a) and 53a-54b (2)[1] and capital felony murder in violation of General Statutes §§ 53a-54b (2) and 53a-8.[2] On October 19, 1981, the defendant moved to dismiss both counts, claiming, inter alia, that the capital felony count was defective "for the reason that one cannot be guilty of capital felony murder on the basis of aiding and abetting capital felony murder."

On December 21, 1981, the defendant filed his second motion to dismiss. Specifically, he argued that the conspiracy count, count one, failed to allege an overt act. In addition, he contended that count two, the capital felony count, was also defective. In particular, he noted: (1) that § 53a-54b (2) requires that a person commit the crime of murder after being hired to do so for pecuniary gain; (2) that count two alleged that his codefendant, Geraldine Burke, hired John McGann, but that the murder was committed by Hope; and (3) that the count failed to allege that Geraldine Burke had hired him. Consequently, the defendant argued that the count failed to allege the offense of capital felony mur-

[1] "[General Statutes] Sec. 53a-48. CONSPIRACY. RENUNCIATION. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

"[General Statutes] Sec. 53a-54b. CAPITAL FELONY. A person is guilty of a capital felony who is convicted of any of the following . . . (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary or murder committed in the course of commission of a felony . . . ."

[2] "[General Statutes] Sec. 53a-8. CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

der in violation of § 53a-54b (2). The trial court rejected the defendant's claim as to count two, but dismissed count one, charging conspiracy, because of its failure to allege an overt act.

On July 15, 1982, however, the grand jury returned a new conspiracy indictment, alleging the following: "In furtherance of the conspiracy and to effect the objects thereof, one or more of the following overt acts were committed:

"1. In July, 1981, the exact date being to the Grand Jury unknown, Geraldine Burke borrowed three thousand five hundred ($3,500) dollars from a neighbor to pay for the murder of Donald C. Burke.

"2. Several days thereafter, the exact date being to the Grand Jury unknown, Geraldine Burke gave the money to John McGann.

"3. Near the end of July or early August, 1981, the exact date being to the Grand Jury unknown, James Y. Hope told Geraldine Burke how he would kill the victim, Donald Burke.

"4. On August 8, 1981, at the directions of John McGann, Geraldine Burke got the victim, Donald Burke's, handgun from Donald Burke's truck.

"5. On August 8, 1981, in the night hours or the early morning of August 9, 1981, Geraldine Burke, James Y. Hope and John McGann met in downtown Niantic and John McGann got Donald C. Burke's handgun from Geraldine Burke and the three parties arranged to meet at the Burke residence in the early hours of August 9, 1981.

"6. In the early morning hours of August 9, 1981, Geraldine Burke, James Y. Hope and John McGann entered the Burke residence, and the said Donald C. Burke was murdered by one or more of said persons,

Geraldine Burke, James Y. Hope or John McGann, who with intent to cause his death, caused the death of said Donald C. Burke."

The jury selection process commenced on May 3, 1983, and lasted for approximately five weeks. During that time period, defense counsel advised the court that he believed that both counts of the indictment were defective. In an attempt to resolve the ongoing dispute, the state filed, on June 1, 1983, a motion captioned: "Motion for Judicial Determination of Applicability of Section 53a-54b (2) in View of Offer of Proof by the State of Connecticut." The motion sought a ruling from the court as to the culpability of a defendant for capital felony murder in violation of § 53a-54b (2) when that defendant was not hired to commit the murder, but acted as an accessory or coprincipal to the murder. The state conceded in its motion that it had no evidence that the defendant was hired to kill Donald Burke or that he hired anyone to do so. This was the precise issue the defendant had raised in his second motion to dismiss dated December 21, 1981. The trial court, however, took no action regarding the capital felony count at that time.

After the jury had been sworn, on June 29, 1983, the defendant filed his third motion to dismiss the capital felony count and raised again the issue that he had raised in his pretrial motions to dismiss, to wit: That the capital felony count failed to allege that the defendant was hired to kill Donald Burke and that there was no allegation that the alleged hiree, John McGann, murdered Donald Burke. After receiving briefs from the parties, the trial court dismissed the capital felony count with prejudice on July 19, 1983, and advised the parties that a detailed memorandum explaining the basis of its decision would be filed at a later date. The defendant's trial proceeded as to the first count, however, and on August 9, 1983, the jury acquitted him of conspiracy

to commit capital felony murder and the lesser included offense of conspiracy to commit murder. The trial court then filed its memorandum of decision on August 19, 1983, dismissing, with prejudice, the capital felony count, as well as the lesser included murder count. The state sought and was granted permission to appeal the dismissal of the capital felony count, but before the state's appeal was heard this court decided *State* v. *McGann,* 199 Conn. 163, 506 A.2d 109 (1986). As a result of the court's decision in McGann, the state's appeal was dismissed as moot. See *State* v. *Hope,* 203 Conn. 420, 524 A.2d 1148 (1987).[3]

On June 1, 1987, the state filed a substitute information charging the defendant with the crime of murder in violation of General Statutes §§ 53a-54a[4] and 53a-8. Specifically, the state charged that the defendant "while acting in concert with Geraldine Burke and John McGann did, with intent to cause the death of another person, Donald C. Burke, cause the death of said Donald C. Burke." On November 24, 1987, the

[3] In *State* v. *McGann,* 199 Conn. 163, 506 A.2d 109 (1986), this court held that McGann, who was alleged to have committed the crime of capital felony murder as a principal, could not be convicted of that crime. Thus, in *State* v. *Hope,* 203 Conn. 420, 524 A.2d 1148 (1987), this court ruled that the defendant could no longer be tried as an accessory to that capital felony murder, and dismissed the state's appeal as moot.

[4] General Statutes (Rev. to 1981) § 53a-54a, as amended by Public Acts 1980, No. 80-442, §§ 15, 28, provides in part: "MURDER DEFINED. AFFIRMATIVE DEFENSES. EVIDENCE OF MENTAL CONDITION. CLASSIFICATION. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

defendant moved to dismiss the information on double jeopardy and collateral estoppel grounds and for the additional reason that the murder count had been dismissed with prejudice on July 19, 1983. In response, on April 19, 1988, the state filed an amended substitute information, that again charged the defendant with murder in violation of §§ 53a-54a and 53a-8, but this time alleged: "JAMES Y. HOPE at Waterford, Connecticut, with intent that the death of another person, Donald C. Burke, be caused, intentionally aided Geraldine Burke and John McGann in the causing of the death of said Donald C. Burke." On May 2, 1989, the trial court denied the defendant's motion to dismiss, and the defendant then filed this appeal.

On appeal, the defendant argues that the trial court should have granted his motion to dismiss: (1) because aiding and abetting murder and conspiracy to commit murder are the same offense for double jeopardy purposes; (2) because his prosecution for aiding and abetting murder is barred by principles of collateral estoppel as embodied in the double jeopardy clause; and (3) because the murder count against him had previously been dismissed with prejudice. We agree with the defendant's contention that the trial court should have granted his motion to dismiss because his prosecution for aiding and abetting murder is barred by principles of collateral estoppel as embodied in the double jeopardy clause.[5]

I

The state maintains that the defendant is barred from asserting a claim of collateral estoppel because he did

[5] Recently, in *Grady* v. *Corbin*, U.S. (58 U.S.L.W. 4599, May 29, 1990), the United States Supreme Court held that double jeopardy precludes a subsequent prosecution with regard to the same underlying conduct for which a defendant has already been prosecuted. Since the state cannot prevail even under the more restrictive view of collateral estoppel and double jeopardy that predated *Grady*, this avenue of inquiry need not be pursued in this case.

not move to dismiss the second count of the indictment until after the jury was sworn. See *Lee* v. *United States*, 432 U.S. 23, 31–34, 97 S. Ct 2141, 53 L. Ed. 2d 80 (1977); *United States* v. *Dinitz*, 424 U.S. 600, 607, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). The crux of the state's argument is that the defendant's motion to dismiss on June 29, 1983, after the jury had been sworn, was not based on the same grounds as the defendant's earlier motions to dismiss that were filed prior to trial. We are not persuaded by the state's contention.

Specifically, in his first motion to dismiss, dated October 19, 1981, the defendant argued: "7. As to the Second Count, for the reason that one cannot be guilty of capital felony murder on the basis of aiding and abetting capital felony murder." In his second motion to dismiss, dated December 21, 1981, the defendant argued: "3. As to count two for the reason that by its language Section 53a-54b requires that a person commit as a principal (and not as an aider or abetter) one of the eight substantive crimes listed. Specifically, Section 53a-54b (2) requires that the defendant commit murder after being hired to commit same for pecuniary gain. Count two alleges that co-defendant Burke hired co-defendant McGann to commit murder and that the actual murder was committed by "a person or persons, including James Y. Hope." There is no allegation that Burke hired Hope. Consequently, the count fails to allege the offense of capital felony murder." Finally, in his third motion to dismiss, dated June 29, 1983, the defendant asserted: "1. Count two alleges a violation of Connecticut Gen. Stat. § 53a-54b (2), capital felony murder. The indictment alleges that Geraldine Burke hired John McGann for his pecuniary gain, for the purpose of causing the death of her husband, Donald C. Burke. The indictment fails to allege, however, that John McGann murdered Donald C. Burke. Section 53a-54b (2) requires that the 'hiree' commit the

murder. The indictment alleges that Donald C. Burke 'was murdered by a person or persons, including said James Y. Hope. . . .'

The Defendant, of course, has taken the position that the person hired must be 'a defendant,' i.e. James Y. Hope, (see paragraph 3), a position rejected by the [trial] Court.

"2. Section 53a-54b (2) requires that the person hired be a 'defendant.' This is an essential element of the crime. The indictment fails to allege that McGann is 'a defendant.'

"3. By use of the phrase 'a defendant' Section 53a-54b (2) requires that the person hired be the defendant on trial, i.e. James Y. Hope. The indictment fails to allege this element of the crime. Instead, it alleges that Geraldine Burke hired John McGann."

Thus, the defendant's position was consistent throughout. He argued that count two of the indictment did not allege that the murder was committed by the hiree. In short, the defendant contended prior to trial that the state had failed to allege the proper nexus between the hiree and the murder. Moreover, in its memorandum of decision on the defendant's motion to dismiss count two, the trial court wrote: "An essential element of the crime of capital felony murder under Section 53a-54b (2) *is that the person who commits the murder be the one hired to commit it.* In the present case, the second count of the indictment alleges that 'Geraldine Burke hired John McGann for his pecuniary gain, for the purpose of causing the death of . . . Donald C. Burke, and . . . the said Donald C. Burke was murdered by a person or persons including said JAMES Y. HOPE.' *The indictment alleges no connection between the allegation that John McGann was hired for pecuniary gain to cause the death of the victim and the allegation that the defendant murdered the victim.*

"An allegation which links pecuniary gain to the murder is required in an indictment under section [53a-54b (2)]. It must be alleged that John McGann, the hiree for pecuniary gain, actually participated in the murder or, at a minimum, *that the person or persons who committed the murder did so as John McGann's agents.* Because of the absence of any allegation as to this essential element of the crime of capital felony murder, the second count of the indictment is defective." (Emphasis added.)

The state's argument therefore fails because the defendant did not wait to move to dismiss the second count of the indictment until after the jury had been sworn. Rather, the record fully sustains the defendant's position that he had moved twice prior to trial to have the second count dismissed because the indictment failed to allege a proper nexus between the hiree and the murder.[6]

[6] In *Lee* v. *United States*, 432 U.S. 23, 97 S. Ct. 2141, 52 L. Ed. 2d 80 (1977), the government's information was dismissed because of its failure to provide adequate notice of the crime charged. The defendant was then retried and convicted of the same crime. The United States Supreme Court then rejected the defendant's double jeopardy claim on the grounds: (1) that the dismissal was not a judgment on the merits; and (2) that the trial court was forced by the defendant's late filing of the motion to rule upon it after jeopardy had attached. Justice Brennan, however, wrote in his concurring opinion: "I emphasize, however, that an entirely different case would be presented if the petitioner had afforded the trial judge ample opportunity to rule on his motion prior to trial, and the court, in failing to take advantage of this opportunity, permitted the attachment of jeopardy before ordering the dismissal of the information. In such a circumstance, the court's action or inaction would effectively deprive petitioner of his 'valued right' to receive a factual determination from the first empaneled factfinder and would subject a defendant to the 'embarrassment, expense and ordeal' of a needless trial[.] *Green* v. *United States*, 355 U.S. 184, 187 [78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)]. Even if the defendant renews his motion at trial, it would not be accurate in such a situation to argue that the defense has made the choice to forgo the right of presenting its case to the first factfinder in order to attain a beneficial legal ruling. *United States* v. *Dinitz*, 424 U.S. 600 [96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976)]; *United States* v. *Jorn*, [400 U.S. 470, 485, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)]. On the

II

Having concluded that the defendant is not barred from asserting a claim of collateral estoppel, we shall examine his claim on the merits. In a criminal case, collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. *Ashe* v. *Swenson,* 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id., 443. "Collateral estoppel applies in two ways: (1) it may bar prosecution or argumentation of facts necessarily established in a prior proceeding; or (2) it may completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks. *United States* v. *Griggs,* 735 F.2d 1318 (11th Cir. 1984)." *United States* v. *DeMarco,* 791 F.2d 833, 836 (11th Cir. 1986).

To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the government is attempting to relitigate those facts in the second proceeding. *De La Rosa* v. *Lynaugh,* 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Irvin,* 787 F.2d 1506, 1515 (11th Cir. 1986).

contrary, the defendant placed in this predicament by the trial judge would have done everything in his power to receive a fair adjudication of his legal claims without compromising his right to proceed with the first factfinder. Honoring his double jeopardy claim thus not only is in keeping with the policies and interests served by the Clause, but also would further the cause of efficient judicial administration by encouraging defendants to present, and judges to rule, on legal claims prior to the clamor and heat of trial." Id., 35–36 (Brennan, J., concurring).

"A defendant who argues that *Ashe* is applicable to his case carries the burden of establishing that the issue he seeks to foreclose from consideration in the second case was 'necessarily' resolved in his favor in the prior proceeding. *United States* v. *Seijo,* 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S. Ct. 745, 50 L. Ed. 2d 756 (1977)." *United States* v. *Castro,* 629 F.2d 456, 465 (7th Cir. 1980). Furthermore, when a defendant is acquitted of conspiracy and then retried on the substantive offense, "if it can be determined that the first jury must have determined an ultimate fact common to the conspiracy and substantive crimes in the defendant's favor, acquittal of conspiracy may prevent the government from introducing the evidence necessary to convict the defendant of the substantive offense in a subsequent trial." *United States* v. *Bollinger,* 796 F.2d 1394, 1406 (11th Cir. 1986).

"The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon* v. *United States,* 332 U.S. 575, 579 [68 S. Ct. 237, 98 L. Ed. 180 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Ashe* v. *Swenson,* supra, 444.

"Moreover, in reviewing the earlier trial to determine the jury's basis for the acquittal, a court 'should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested.' *United States* v. *Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), cert. denied, 430 U.S. 946, 97 S. Ct. 1581, 51 L. Ed. 2d 793 (1977). See also *United States* v. *Mespoulede*, [597 F.2d 329, 333 (2d Cir. 1979)]. ' "[U]nrealistic and artificial speculation about some far-fetched theory upon which the jury might have based its verdict of acquittal" is foreclosed.' *State* v. *Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984), quoting *United States* v. *Sousley*, 453 F. Supp. 754, 762 (W.D. Mo. 1978)." *Ferrell* v. *State*, 318 Md. 235, 245–46, 567 A.2d 937 (1990); see *United States* v. *Mespoulede*, supra. Limited ambiguity that exists in a jury's verdict should be "resolved, in accordance with the protections of the Double Jeopardy Clause, in favor of the defendant." *United States* v. *Hans*, 548 F. Sup. 1119, 1126 (S.D. Ohio 1982).

In the present case, at the defendant's trial for conspiracy to commit capital felony, for which he was acquitted, the state had the burden of proving beyond a reasonable doubt the following: (1) that the defendant intended that Donald Burke be murdered; (2) that the defendant agreed with John McGann and/or Geraldine Burke to "engage in or cause the performance" of the murder; and (3) that the defendant, McGann and/or Geraldine Burke committed an overt act in furtherance of the conspiracy to murder Donald Burke. In the state's proposed second trial for aiding and abetting murder, the state will have to prove beyond a reasonable doubt the following: (1) that the defendant intended that Donald Burke be murdered;[7] and (2) that

[7] "Whether a person who is present at the commission of a crime aids or abets its commission so as to be criminally liable depends on the circumstances surrounding his presence there and his conduct while there. ' "The

the defendant "intentionally aided" McGann and/or Geraldine Burke in the murder of Donald Burke.

The defendant maintains that in acquitting him of conspiracy to commit capital felony murder, and the lesser included offense of conspiracy to commit murder, the jury necessarily determined that he lacked the intent that Donald Burke be murdered. The defendant thus argues that, since that same element of intent is necessary for him to be found guilty of aiding and abetting Donald Burke's murder, the state is collaterally estopped from bringing the second prosecution for aiding and abetting murder.

Therefore, the seminal question that we must resolve is whether, in the defendant's trial for conspiracy to commit capital felony murder, the jury could have acquitted the defendant, yet still, rationally and reasonably, have found that the defendant possessed the specific intent that Donald Burke be murdered. In other words, if the jury could have rationally and reasonably concluded that the state did not meet its burden of proving an agreement, but did meet its burden regarding the defendant's intent, then the defendant's collateral estoppel claim must fail.[8] If, however, the jury could not have acquitted the defendant without necessarily

accessory statute, [General Statutes] § 53a-8, sets forth the element of intent as a twofold requirement: that the accessory have the intent to aid the principal and that in so aiding he intend to commit the offense with which he is charged. See LaFave & Scott, Criminal Law (1972), p. 505 n.53, § 64.' . . . *State* v. *Harrison*, [178 Conn. 689, 694, 425 A.2d 111 (1979)].' *State* v. *Haddad*, [189 Conn. 383, 399, 456 A.2d 316 (1983)]. 'A person acts "intentionally" with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.' . . . Intent is a mental process, and absent an outright declaration of intent, must be proved through inferences drawn from the actions of an individual . . . ." (Emphasis omitted.) *State* v. *Crump*, 201 Conn. 489, 495, 518 A.2d 378 (1986).

[8] The state does not argue that the jury could have rationally and reasonably concluded that no overt act in furtherance of the conspiracy was committed.

determining that he lacked the specific intent that Donald Burke be murdered, then the defendant must prevail on his claim of collateral estoppel.

We conclude that the jury necessarily determined that the defendant lacked the specific intent that Donald Burke be murdered. For the jury to have acquitted the defendant, one of the following scenarios must have taken place. The jury might have believed the defendant's version of what transpired on the night of Donald Burke's murder, i.e., that he went to the Burke house with the intent of preventing the murder, that he did not beat Donald Burke and that he was not in the bedroom when Donald Burke was killed. If this were so, then logically the jury necessarily determined that the defendant lacked the intent that Donald Burke be murdered. Also, given that the jury received an instruction on the effect of intoxication on a defendant's intent, the jury might have concluded that the defendant lacked the intent to kill Donald Burke as a result of his intoxication.[9] Finally, the state argues that the jury could simply have found that there was no agreement between the defendant, McGann and/or Geraldine Burke. If the jury believed the state's version of the case, however, we cannot conceive of how the jury could have rationally and reasonably concluded that the defendant had the intent that Donald Burke be murdered, but did not "agree" with McGann "to engage in or cause the performance" of the murder.

[9] The trial judge charged the jury on intoxication in the following manner: "Now, under the law of this state, a person may be so intoxicated from the voluntary consumption of alcoholic beverages that he may lack the specific intent to commit the crime charged. Intoxication is defined under the statutes as 'a substantial disturbance of mental or physical capacities resulting from introduction of substance into the body.' . . . If, therefore, you have a reasonable doubt that the defendant possessed the specific intent required because of his intoxicated condition, you must find him not guilty of the charge of conspiracy to commit capital felony murder."

Specifically, the jury received the following instruction on "agreement": "For . . . persons to be guilty of the crime of conspiracy, it is not necessary that there should be a formal agreement among them. It need not be in any expressed form. It is not necessary for the State to prove that there was a formal or expressed agreement alone. It is sufficient if there is a meeting of the minds; that is, if the parties understand one another, whether they express themselves in so many words or not." Thus, it is difficult to fathom how the jury could have rationally and reasonably concluded that the defendant did not agree with McGann "to engage in or cause the performance" of Donald Burke's murder, yet still believed that the defendant drove McGann to the Burke house, walked into Donald Burke's bedroom, began to beat Donald Burke, stopped beating Donald Burke while McGann shot him, and then started beating Donald Burke again until McGann told him to stop because Donald Burke was dead.

In sum, we conclude that the jury necessarily determined that the defendant lacked the specific intent that Donald Burke be murdered, and thus, since that same intent is an essential element of the state's second prosecution, the state is collaterally estopped from proceeding with that prosecution. See *United States* v. *DeMarco*, supra, 836.

The ruling of the trial court is reversed and the case is remanded to that court with direction to grant the defendant's motion to dismiss.

In this opinion the other justices concurred.

DOCKET NO. 13720

STATE OF CONNECTICUT : SUPREME COURT

V : STATE OF CONNECTICUT

JAMES Y. HOPE : JULY 19, 1990

MOTION FOR REARGUMENT OR RECONSIDERATION

* * * * *

I. BRIEF HISTORY OF CASE

* * * * *

(Page 1)

II. SPECIFIC FACTS RELIED UPON

Before reaching the issue of collateral estoppel, this Court first considered whether defendant claimed the same grounds in his 1981 motions to dismiss as he raised in his June 29, 1983 motion. This Court found the grounds were the same and ruled, therefore, that he was not barred from asserting such claim. *State v. Hope*, 215 Conn. 570, at 583. The grounds were in fact different, and defense counsel specifically stated to the Trial Court that his June 29, 1983 motion was based on different and new grounds. (T. 6/29/83 pp. 141, 161)

In the October 19, 1981, Motion to Dismiss, defendant claimed that *he* could not be guilty of capital felony as an accessory (R 20 ¶ 7). In the December 21, 1981 motion, (R 22) defendant claimed that *he* could not be guilty of capital felony as an aider and abettor; specifically that the statute requires that *he* commit the murder after being hired (i.e. that *He* must have been the hired person to be guilty). "There is no allegation that Burke hired Hope. Consequently the count fails to allege the offense" (¶ 3). In the June 29, 1983 motion filed after the jury was sworn, (R 29) defendant set forth three grounds for dismissal. The first ground was that, although the

indictment alleged that Burke hired Mcgann, but "[T]he indictment fails to allege, however, the John *McGann* murdered Donald C. Burke" which it (allegedly) failed to do. (1 ¶ 1) (underlining supplied). This paragraph goes on to acknowledge that defendant has taken the position that the person hired must be Hope. (his previous claim) restated in ¶ 3.

On June 28, 1983 the Court ruled on the State's motion for a judicial determination of the sufficiency of count two of the indictment. At that time it addressed the two claims made by the defendant in his previous motions to dismiss and, in effect held the indictment was sufficient) (T. 6/28/83 pp. 132-138).

When the June 29th motion was first argued in the Trial Court, the defendant referred to his claim in ¶ 3 of the motion (Hope must be the hired person), saying he "presses that argument to protect the record. (T. 6/29/83 p. 140) He then stated "*Paragraph one is a completely new argument . . .*" underlining supplied). (Id 141) Shortly thereafter Judge Hendel acknowledged "that's a new point", and asked for the State's Attorney's argument on that new point (Id 143). As argument was being given, the Court referred to its ruling the day before, that the indictment was not fatally defective, but then referred to the new claim (Id 145), because the new issue was raised for the first time that morning. The Court questioned whether it should be barred because he sat on his rights, saying this was the first time he raised the issue (Id 159). Defense counsel acknowledged that the State's Attorney might be suspicious of his comment, and said "Actually, I tell you honor honestly, I did not see this defect until your Honor ruled yesterday . . ." (Id 161).

On July 19, 1983, the Court rendered its oral decision that it was dismissing the second count as being defective because ". . . it does not charge that the person, that is John McGann, alleged to have been hired to commit the murder for pecuniary gain, committed murder" (T. 7/19/83 p. 327).

Between May 3, 1983 and June 28, 1983 (jury selection) the defendant at least 15 times objected to the Court even considering the sufficiency of the second count, stating he made no new motion to dismiss it, or the Court couldn't act suo moto. (T. 5/6/83 pp. 10-11, 17; 5/12/83 p. 16; 6/22/83 pp. 27, 29, 37, 39, 45, 47, 49-56, 59, 64, 89, 93, and 125-130) *He also objected to the Court dismissing the count.* (T. 6/22/83 pp. 64, 125-130)

During many of these hearings when defendant gave substansive response, it related only to his claims either that the defendant, Hope, must be the hired person, (Eg. T. 6/22/83 pp. 2-10, 12) or that he couldn't be guilty as an accessory under the law. (Eg. T. 6/22/83 pp. 2-10, 12) At no time prior to his June 29, 1983 motion did he ever argue or suggest that the second count was defective because it failed to allege that McGann, the hired person, was involved in the murder.

During the June 29, 1988 argument on the double jeopardy claim the Trial Court pointed out that the defendant caused the separation of the counts by waiting until after the jury was sworn before filing the new motion to dismiss in spite of the fact that he had been asked to do so before the jury was sworn. The Trial Court again pointed out that this motion raised different grounds.

In charging the jury, the Court instructed them that they were concerned only with the conspiracy as requiring an *agreement*, using that term at least 17 times in critical places. It stated that an overt act must be done because of a *previous* agreement among the parties. (T. 8/8/83 p. 48). At no time did the Court instruct on accessorial liability.

STATE OF CONNECTICUT

SUPREME COURT

NO. 13720

STATE OF CONNECTICUT

v.

JAMES Y. HOPE

RECEIVED
SEP 19 1990
STATE'S ATTORNEY
NEW LONDON
JUDICIAL DISTRICT

: SEPTEMBER 18, 1990

ORDER

THE MOTION OF THE STATE OF CONNECTICUT, FILED JULY 19, 1990, FOR REARGUMENT OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 9-18-90
BUCKLEY & SANTOS
C. ROBERT SATTI, SR., S.A.
KEVIN T. KANE, A.S.A.
CLERK, NEW LONDON J.D.
CR10-119096
HON. SEYMOUR HENDEL
REPORTER OF JUDICIAL DECISIONS

SUPREME COURT — STATE OF CONNECTICUT

#13720 — *STATE V. HOPE*

EXTRACTS FROM STATE'S BRIEF

COUNTER STATEMENT OF PROCEEDINGS

INTRODUCTION

Defendant, by artful choice of words, has in effect misstated three important facts in his brief, as follows:

(1) *Def. Br. pp. 1 & 3.* Although defendant raised a pleading defect in his 12/21/81 Motion to dismiss (R. 22), it was-not on the same ground alleged in his 6/29/83 motion (R. 29, ¶ 1). Arguing in support of his motion on 6/29/83, defense counsel stated, "Actually I tell your Honor honestly, I did not see this defect until your Honor ruled yesterday . . ." (T. 6/29/83, 161).

(2) *Def. Br. p. 3.* Contrary to defendant's claim the court did not refuse to grant the state an advisory ruling! It exhaustively considered the arguments of counsel, the law, and recognizing its power to dismiss a defective indictment, suo moto, it took no action because it did not find this count defective (T. 6/28/83, 133-138).

* * * * *

PROCEEDINGS

In addition to the Proceedings contained in defendant's brief, the following occurred.

During jury voir dire, defense counsel was suggesting that, to be guilty, this defendant must aid in the hiring. When it ***(page 1)*** was suggested that he was making a motion to dismiss, defense counsel stated he was not moving to dismiss (T. 5/6/83, 2-3, 10-11, 17). Later he claimed the

defendant must be the hired person, and could not be guilty as an accessory. When asked if he was making a motion to dismiss, counsel stated that absent an offer of proof, he didn't have to do anything except consider his options. The court stated he couldn't hold back and later claim a mistrial (T. 5/12/83, 2, 15, 16, 17).

On June 1, 1983, the state filed its Motion for Judicial Determination, including its offer of proof (R. 25). The court initially took no action on this motion because defense counsel claimed the court could not act, suo moto (T. 6/22/83, 36-38, 45).[1] Because defense counsel continued to suggest in chambers and in court that the indictment was defective, the state again asked the court to determine if the second count was defective, as claimed by defendant, pointing out that defendant had made no current motion to dismiss, and that he did not intend to do so until the jury was sworn (Id. 2-10, 12). The state's attorney urged the court to make the legal determination before jeopardy attached, pointing out that it had the power to do so if it found the indictment to be defective (Id. 27-29, 53). Defense counsel stated he had not moved to dismiss and objected to the court acting suo moto, disputing its power to so act (Id. 37, 39, 43, 47, 49, 54, 59).

(page 2)

Defense counsel acknowledged that by not moving to dismiss because of a facially defective indictment, he might be waiving his right to do so (Id. 51-52). He argued at length against the court's power to dismiss; he refused to address possible grounds of dismissal and vehemently objected to the court dismissing the second count; substantively argued against it and objected to any dismissal (Id. 49-56, 64). The court stated if it decided one way, it ws not going to change after the jury was sworn (Id. 65).

---

[1] In the earlier *Hope* appeal, DN 12311, the reporter included in a single volume of 332 pages excerpts from proceedings between 6/22/83 and 7/19/83. References are to the pages of that volume. *(page 2)*

After a recess, the court stated it had the right to dismiss a defective indictment and asked for arguments on the merits (Id. 75). Defense counsel only argued, as before, that the hired person must be the defendant and objected to the court ruling (Id. 85, 89, 93). After the luncheon recess, defendant moved to have the jury of 12 sworn before the alternates were selected, but the court denied such request (Id. 103-105). The state reminded the court that defendant had full notice of the state's claims (Id. 105-110). Defense counsel asked if the second count was dismissed, what would happen to the first count. The state responded that the election to postpone trial or proceed would be up to defendant (Id. 120. 124-125). Defense counsel responded that defendant wanted to go to trial; had made no motion to dismiss; and objected to a dismissal. The court reserved decision (Id. 125-131).

On June 28, the court rendered its decision that the second count was not facially defective, and thus took no action to ***(page 3)*** dismiss it, suo moto (Id. 133-138). After the jury was sworn on June 29, defendant moved to dismiss the second count as being defective because it failed to allege that the hired person, McGann, committed the murder (R. 29). During extensive argument, defendant claimed the trial could not continue on the lesser offense of murder (Id. 163-164). Again the state offered defendant the option of proceeding on the first count or delaying trial until both counts could be tried together, pointing out that he intended to appeal an adverse decision, and that double jeopardy would pose no bar to retrying the second count. Defendant wanted the trial to proceed (Id. 167-169).

On July 8, during further argument, the State's Attorney advised the court he had an amendment to the indictment and a bill of particulars to clear any possible defect (Id. 198-99). He also suggested to the court a number of ways that trial could proceed on both counts. Defendant objected to such action, and the court sustained his objections (Id. 199-206). Again the state claimed double jeopardy would not bar a retrial of the second count (Id. 223-24). The State's

Attorney reiterated his intent to retry the second count on July 18 (Id. 260) and on July 19 (Id. 317).

On July 19, upon being pressed by defendant for an oral decision, the court dismissed with prejudice the second count because it did not allege that McGann committed the murder; and ruled that such defect could not be cured by amendment, or bill of particulars; and that the lesser included offense ***(page 4)*** of murder could not be submitted to the jury by redaction (Id. 316, 327-328). The state then attempted to file an information charging capital felony (Ct's Ex. J) since the law now required prosecution by information, and suggested how the two charges could be tried together, thus affording defendant the opportunity of facing only one trial (Id. 316-317). The defendant objected and the court would not permit the filing.

After the jury was sworn on June 29, until the date of the court's ruling on July 19, the state presented evidence tending to prove both counts, but had not completed its direct case.

The jury returned a verdict of not guilty as to the first count on August 9. The state, having previously been granted permission, appealed on August 12, 1983. The court filed its written memorandum on August 12, *striking* the second count (R. 46).

COUNTER STATEMENT OF FACTS

* * * * *

On August 6, 1981, when the state alleges Hope first became involved in the existing conspiracy at the Allen house and later ***(page 5)*** that day at Hope's house, such couldn't be for the following reasons:

(a) Hope went to the Allen house in the late morning with his girlfriend, Sherry. He spent the entire day with her or in her company while playing pool and horseshoes with her

and/or with Charles and John Allen (A-1, 5). Geraldine, Tammy and McGann arrived together later in the day and stayed a while. At no time was Hope alone with Geraldine. He never had any conversation with her about a plot to kill her husband, nor with McGann, nor Tammy (A-2). Hope and Geraldine were not on the blanket together, but Hope was with Tammy for a short while (A-2, 7). Hope wasn't involved with any conspiracy. He wasn't involved in any plan to kill Donald (A-3, 4, 6, 7). When he found out about the plan, he offered to give Geraldine the money so it could be paid back (A-2, 3, 8).

(b) When Geraldine, Tammy and McGann left the Allen house, Hope was still there with the Allen brothers and Sherry (A-3, 5). Later in the day, Hope, Sherry and Charles Allen left together and went to Danny's where Charles was dropped off (A-3, 5).

(c) Geraldine, herself, testified that she never hired McGann to kill her husband (A-6, 7). She never hired Hope and she never agreed with him to kill her husband (A-6, 7). Hope never agreed with McGann or Geraldine to kill Donald (A-3, 6, 7).

Geraldine first made up her mind to kill Donald on August 8. She never talked to Hope about it before and she didn't *(page 6)* expect him to participate in the killing (A-6, 7). Although she talked to McGann about it twice on the 8th, she had no prior contact with Hope until she saw him in the parking lot (A-7).

* * * * *

(page 7)

D—Double Jeopardy Not Applicable Where Defendant's Actions Cause Separation of Charges

In the context of separate trials, the purpose of the Double Jeopardy Clause is to prohibit the state, with all of its resources, from making repeated attempts to convict the defendant. It is designed to prohibit government oppression. But these principles, which include collateral estoppal, do not apply if the separation of the charges is caused by the defendant. In *Jeffers v. United States,* 97 S. Ct. 2207, 2217 (1977) the court held that there is no violation of the Double Jeopardy Clause when the defendant elected to have the two offenses tried separately and persuades the trial court to honor his selection. In *Sanabria v. United States,* 98 S. Ct. 2170, 2185 (1978) in referring to the prior acquittal prong of the clause, specifically noted that this was not a case where the actions of the defendant had been the cause of the second trial, citing *Jeffers.* In *Brown v. Ohio,* 97 S. Ct. 2221 (1977) the court stated that its decision on double jeopardy was not concerned with the permissability of separate prosecutions when the accused opposes a consolidated trial. In *United States v. Scott,* 98 S. Ct. 2187 (1978) the court points out that double jeopardy is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution (p. 2196). It goes on to state that the clause which bars government oppression does not relieve a defendant from the consequences of his voluntary choice (p. 2198).

(page 15)

The reason for the 'non-applicability' rule is probably best stated in *Ohio v. Johnson,* 104 S. Ct. 2536 (1984), where the court noted that, where the state has made no effort to prosecute the charges seriatim, the considerations of double jeopardy implicit in the doctrine of collateral estoppal are inapplicable (p. 2541, n.9). The court in effect stated that double jeopardy is not to be used as a sword to prevent the state from having one full and fair opportunity to convict those who have violated its laws where the actions of the defendant have effectively separated the charges.

The case of *Illinois v. Somerville*, 93 S. Ct. 1066 (1973) is similar to the instant case. There the issue related to a defective indictment which failed to charge an offense and which could not be amended. The day after the jury was impaneled and sworn, the prosecutor realized the pleading was fatally defective and moved for a mistrial. The court granted the motion; defendant was reindicted; and upon presentment, he claimed double jeopardy barred a retrial. The court held that manifest necessity and the ends of justice — "the public's interest in fair trials to end in just judgments" — mandated the action taken and there was no double jeopardy bar to retrial even though jeopardy had attached. In the instant case, defendant, not the prosecutor, made the motion, thus making this case stronger for reprosecution. Where the defendant moves for a mistrial, a retrial is not barred by double jeopardy. *Oregon v. Kennedy*, 102 S. Ct. 2083, 2089 (1982).

(page 16)

* * * * *

E—Since Defendant's Actions Caused Mistrial, He Cannot Claim Double Jeopardy

There can be no serious dispute that the defendant by his actions both before and after the jury was sworn, and before and after the court's ruling, deprived himself of any right to claim a double jeopardy bar to reprosecution.

(1) *Before the jury was sworn:* He made no motion to dismiss the second count because of a claimed failure to allege that McGann, the hired person, had committed the murder. He continually stated he was not moving to dismiss this count; claimed the court had no power to act unless he made a motion; claimed the court could not act suo moto; claimed that even if it could, it should not do so. As the court began indicating it would consider the sufficiency of the indictment, at that time, he moved to have the jury sworn, even before the alternates were chosen.

(page 18)

(2) *After the jury was sworn:* He immediately moved to dismiss the second count because of an alleged defect in pleading. He resisted every effort by the state to correct the claimed defect by amending the indictment or by filing a bill of particulars. Not only did he object to such action, but convinced the court (erroneously) that legally it could not permit such action.

(3) *Before the court's ruling.* When the court began indicating that it might be inclined to grant defendant's motion as to the designated offense in the second count, defendant not only objected to, but argued against the legality of redacting that count and proceeding on the lesser offense of murder charged therein. He continued such resistance even after the state agreed to proceed on that lesser count.

(4) *After the court's ruling.* The state's attorney sought to file an information clearing any alleged defect, but the court denied such motion because of defendant's objection.

During the above proceedings, the state did all it could to insure that the two counts were tried together. Before the jury was sworn, it moved for a judicial determination of the legal sufficiency of the pleading. After the jury was sworn, it sought to amend the allegedly defective pleading; sought to file a bill of particulars; even agreed to proceeding on the lesser offense charged in that count; and sought to file a correcting information. In each instance the state's attorney stated he was doing so to allow one trial on both counts, even ***(page 19)*** though he believed double jeopardy would not bar a subsequent trial on the second count if the court dismissed it.

In view of the above, it is clear that defendant's actions deprive him of any double jeopardy claim. There has been no attempt by the state to try the charges seriatim. Defendant has used the double jeopardy clause as a sword to prevent the state from having one full and fair opportunity to

convict those who have violated its laws. *Ohio v. Johnson*, supra; *State v. Evans*, supra. Defendant's interests must be subordinated to society's interests in a fair trial to end in a just judgment, *State v. Aillon*, supra.

* * * * *

(page 20)

IV—NO COLLATERAL ESTOPPAL BAR TO RETRIAL

A—Defendant Barred From Raising Claim

Defendant's second claim relates to the collateral estoppal doctrine embodied in the Double Jeopardy Clause. As noted earlier, where the state has made no effort to prosecute the charges seriatim, the principles of double jeopardy implicit in the doctrine of collateral estoppal are inapplicable. *Ohio v. Johnson*, supra, p. 2541, n. 9. Double jeopardy is not to be used as a sword to prevent the state from having one full, fair opportunity to convict those who have violated its laws where defendant's actions have effectively separated the charges. Id. This is certainly true where, as here, the actions of the defendant prevented the jury from even considering the second charge. ***(page 21)*** *Jeffers v. United States*, supra. As this court stated in *PX Restaurant, Inc. v. Windsor*, 189 Conn. 153, 161-62 (1983). "In order to invoke the doctrine "the party . . . against whom collateral estoppal is asserted . . . must have been given a full and fair opportunity to litigate in a prior proceeding the issue sought to be precluded in the subsequent proceeding." Thus, the court should not even consider the merits of this issue.

B—Doctrine Requires Defendant To Prove That Ultimate Fact He Seeks To Foreclose Was Necessarily Decided In His Favor

* * * * *

(page 22)